

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 3**

PAK NORWICH MANAGEMENT INC.

Employer

And

Case 03-RC-268722

**RETAIL, WHOLESALE, AND DEPARTMENT
STORE UNION, UFCW**

Petitioner

DECISION AND DIRECTION OF ELECTION¹

Pak Norwich Management Inc. (the Employer) operates a Taco Bell and Kentucky Fried Chicken at its Norwich, New York facility. Retail, Wholesale, and Department Store Union, UFCW (the Petitioner) seeks to represent approximately 20 of the Employer's employees in the following unit:

Included: All full-time and regular part-time employees employed by the Employer at its Norwich, New York facility. Excluded: Office clerical employees, managers and guards, and professional employees and supervisors as defined in the Act.

The parties stipulate, and I find, that this unit is appropriate for collective bargaining.

The only matter in contention is whether to conduct a manual or mail ballot election. The Petitioner initially stated a preference for a manual election held at a coffee shop near the Employer's premises. The Petitioner now takes the position that a mail ballot election is the safest and most appropriate method of election during the present Covid-19 pandemic. The Employer, meanwhile, takes the position that a manual election should be held on its premises.

The Employer has proposed that a manual election be held in the restaurant's lobby/dining room, a space which measures 38 feet along one wall, 20.8 feet along a second wall, and 40.9 feet along the third wall. The fourth side of the proposed space is the service counter between the kitchen and the lobby; the counter runs at an angle, resulting in the different

¹ The petition in this case was filed under Section 9(c) of the Act. The parties were provided opportunity to present evidence on the issues raised by the petition at a hearing held via videoconference before a hearing officer of the National Labor Relations Board (the Board). I have the authority to hear and decide this matter on behalf of the Board under Section 3(b) of the Act. I find that the hearing officer's rulings are free from prejudicial error and are affirmed; that the Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction; that the Petitioner is a labor organization within the meaning of the Act; and that a question affecting commerce exists concerning the representation of certain employees of the Employer. Parties were given the opportunity to file post-hearing briefs, and both parties did so.

lengths of the second and third wall. The Employer estimates that 17 people can maintain a social distance within the lobby.²

The Petitioner objects to the lobby as an election location for three reasons. First, the Petitioner argues that the lobby is monitored by security cameras which might have a coercive effect on voters. Because the voters are aware that the cameras' surveillance footage can be accessed by a manager's phone, the Petitioner is not satisfied that the Employer's offer to disable the cameras during a manual election sufficiently addresses its concern. Second, the Petitioner notes that the proposed election hours of 3:00 p.m. to 6:00 p.m. overlap with the busiest time of the Employer's day. The Employer is willing to close the restaurant on the day of the election in order to eliminate the complication of customers walking through the voting area. Finally, the Petitioner asserts that, because members of the public will have access to the proposed voting area, not only in the 14 days prior to the election, but right up until the polls open, the Employer cannot possibly comply with Memorandum GC 20-10: Suggested Manual Election Protocols.

In response to the evolving realities of the pandemic, the Office of the General Counsel issued Memorandum GC 20-10 on July 6, 2020. The suggested protocols include: polling times sufficient to accommodate social distancing without unnecessarily elongating exposure among Board Agents and observers; the employer's certification in writing that polling area is consistently cleaned in conformity with CDC standards; a spacious polling area, sufficient to accommodate six-foot distancing; separate entrances and exits for voters; separate tables spaced six feet apart; sufficient disposable pencils without erasers for each voter to mark their ballot; glue sticks or tape to seal challenge ballot envelopes; plexiglass barriers of sufficient size to protect the observers and Board Agent; and provision of masks, hand sanitizer, gloves and disinfecting wipes. The Employer asserts that it is willing to comply with all protocols as necessary and emphasizes that its employees have reported to work throughout the pandemic.

Memorandum GC 20-10 also requests an employer's written certification of how many individuals have been present in the facility within the preceding 14 days who have tested positive for Covid-19; who have been directed by a medical professional to proceed as if they have tested positive for Covid-19; who are awaiting results of a Covid-19 test; who are exhibiting symptoms of Covid-19; or who have had direct contact with anyone in the previous 14 days who has tested positive for Covid-19. In the instant case, the Petitioner posits, the Employer cannot track this information because members of the public enter the Employer's proposed election site each day. Therefore, the Employer, regardless of its intentions, cannot possibly provide an accurate certification.³

² The Petitioner argues that there is in practice insufficient space for social distancing in the dining area if booths, chairs, and tables cannot be removed.

³ The Petitioner also disputes the Employer's statement that its employees are subject to daily temperature checks.

The Board offered further guidance regarding the direction of manual elections during the Covid-19 pandemic in *Aspirus Keweenaw*, 370 NLRB No. 45 (November 9, 2020). In *Aspirus Keweenaw*, the Board set forth six situations under which a Regional Director should consider directing a mail-ballot election. Those six situations are:

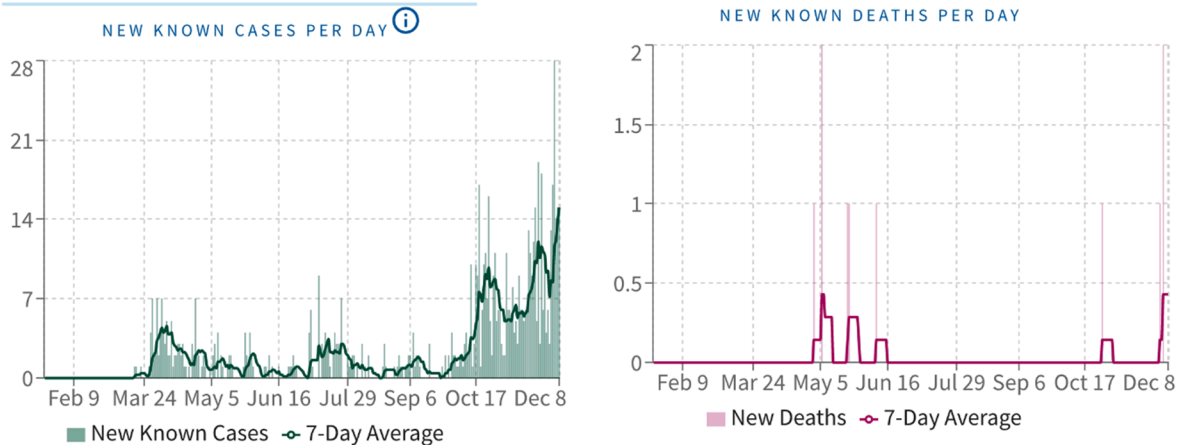
- 1) The Agency office tasked with conducting the election is operating under “mandatory telework” status;
- 2) Either the 14-day trend in the number of new confirmed cases of Covid-19 in the county where the facility is located is increasing, or the 14-day testing positivity rate in the county where the facility is located is 5 percent or higher;
- 3) The proposed manual election site cannot be established in a way that avoids violating mandatory state or local health orders relating to maximum gathering size;
- 4) The employer fails or refuses to commit to abide by the GC Memo 20-10 protocols;
- 5) There is a current Covid-19 outbreak at the facility or the employer refuses to disclose and certify its current status; and
- 6) Other similarly compelling considerations.

As the Board acknowledged, no Regional Office, including Subregional and Resident Offices, has been in a mandatory-telework status since mid-June. The Employer’s proposed polling place does not appear to violate any mandatory state or local health orders, and there is no indication that there has been a Covid-19 outbreak at the Employer’s facility. However, as the Petitioner notes, the Employer may not be able to comply with certain aspects of Memorandum GC 20-10 because it cannot know the Covid-19 status of the members of the public who enter its facility each day to purchase food. For this same reason, public health officials have proposed allowing essential food service workers like those at issue here to receive a Covid-19 vaccine before it becomes available to the public at large: there is no way to prevent a restaurant customer from knowingly or unknowingly entering the premises while infected.

In *Aspirus Keweenaw*, the Board instructed Regional Directors to focus their evaluations on recent statistics that reflect the severity of the outbreak in the specific locality where the election will be conducted and stated that “a mail-ballot election will normally be appropriate if either (a) the 14-day trend in the number of new confirmed Covid-19 cases in the county where the facility is located is increasing, or (b) the 14-day testing positivity rate in the county where the facility is located is 5 percent or higher.”

The Employer's facility is located in Norwich, New York, which is in Chenango County. The testing positivity rate for Chenango County was 4.2 percent as of December 9, 2020.⁴ However, the 14-day trend in the number of new confirmed Covid-19 cases in Chenango County is rising according to the Johns Hopkins Covid-19 status report.⁵ The website USAfacts.org also reports that the trend in the number of new confirmed cases is rising, as shown below:⁶

From cities to rural towns, stay informed on where COVID-19 is spreading to understand how it could affect families, commerce, and travel. Follow new cases found each day and the total number of cases and deaths in Chenango County, New York. This page will be updated with the most recent data as frequently as possible. The underlying data is available for download below the US county map and has helped government agencies like [Centers for Disease Control and Prevention](#) in its nationwide efforts.



The Employer argues that a manual election is appropriate in spite of the rising positivity rate because a manual election would allow for maximum employee participation. This argument is not persuasive. The Employer does not put forward any specific reason that a mail ballot election would be inappropriate in this particular case; rather, the Employer notes that the Board, in general, prefers manual elections. While the Board has, indeed, expressed a general preference for manual balloting, it has never hesitated to ballot by mail when the circumstances warrant it. The Board's preference for manual elections is not to be interpreted as a suggestion that mail balloting is somehow inferior or a less reliable or effective means of determining employees' representational desires. As the Board noted in *London's Farm Dairy, Inc.*, 323 NLRB 1057, 1058 (1997):

[W]hile we agree with our dissenting colleague that the Agency has a proud long tradition of conducting elections by manual balloting and that most elections have been

⁴ See <https://covid19tracker.health.ny.gov/views/NYS-COVID19-Tracker/NYSDOHCOVID-19Tracker-DailyTracker?%3Aembed=yes&%3Atoolbar=no&%3Atabs=n> (last visited December 10, 2020).

⁵ See <https://bao.arcgis.com/covid-19/jhu/county/36017.html> (last visited December 10, 2020).

⁶ See <https://usafacts.org/visualizations/coronavirus-covid-19-spread-map/state/new-york/county/chenango-county> (last visited December 10, 2020).

and are conducted manually, it has an equally long history of conducting elections by mail. From the earliest days of the Act, the Board has permitted eligible voters in appropriate circumstances to cast their ballots by mail. See, for example, *Lykes Bros. S.S. Co.*, 2 NLRB 102, 108, 111 (1936); *United Press Assns.*, 3 NLRB 344, 352 (1937); *Pacific Greyhound Lines*, 4 NLRB 520, 539 (1937); *Pacific Lumber Inspection Bureau*, 7 NLRB 529, 534 (1938); *Salt River Valley Water Users Assn.*, 32 NLRB 460, 472 (1941); *Continental Bus Systems*, 104 NLRB 599, 601(1953); and *National Van Lines*, 120 NLRB 1343 (1958).

The majority opinion in *London's Farm Dairy, Inc.*, holds that balloting by mail is not less effective and does not lend itself to subterfuge, coercion, invasion of privacy or other abuse. As the Board observed then, "Indeed, in the 62-year history of the Act, there has been only one reported instance of such abuse, see *Human Development Assn.*, 314 NLRB 821 (1994), and there is a similar record in the 71-year history of the Railway Labor Act (RLA), under which the use of mail ballots in representation elections has been the rule and not the exception." Also note that no manual election has been conducted by the National Mediation Board (NMB) under the RLA since 1987. Simply put, the Board has a long and proud tradition of conducting manual- and mail-ballot elections alike. It simply prefers manual elections when, unlike here, they are feasible, safe, and practical to conduct.

Based on the rising positivity rate, and the Employer's inability to comply in full with Memorandum GC 20-10, I find that a mail-ballot election is warranted.

Conclusion

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. Employees will vote whether or not they wish to be represented for purposes of collective bargaining by Retail, Wholesale, and Department Store Union, UFCW.

A. Election Details

The election will be conducted by United States mail. The mail ballots will be mailed to employees employed in the appropriate collective-bargaining unit. On December 23, 2020, ballots will be mailed to voters by National Labor Relations Board, Region 3. Voters must sign the outside of the envelope in which the ballot is returned. Any ballot received in an envelope that is not signed will be automatically void.

Voters must return their mail ballots so that they will be received in the National Labor Relations Board, Region 3 office by close of business on January 13, 2021.

Those employees who believe that they are eligible to vote and do not receive a ballot in the mail by December 30, 2020 should communicate immediately with the National Labor Relations Board by either calling the Region 3 Office at 716-551-4931 or our national toll-free line at 1-844-762-NLRB (1-844-762-6572), or contacting Jerry Tidd at 716-398-7026.

Due to the extraordinary circumstances of COVID-19 and the directions of state or local authorities including but not limited to Shelter in Place orders, travel restrictions, social distancing and limits on the size of gatherings of individuals, I further direct that the ballot count will take place virtually, on a platform (such as Zoom, Skype, WebEx, etc.) to be determined by the Regional Director, at 11:00 am on January 14, 2021. Each party will be allowed to have an observer attend the virtual ballot count.

B. Voting Eligibility

Eligible to vote are those in the unit who were employed during the payroll period ending **December 6, 2020**, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off.

Employees engaged in an economic strike, who have retained their status as strikers and who have not been permanently replaced, are also eligible to vote. In addition, in an economic strike that commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

C. Voter List

As required by Section 102.67(l) of the Board's Rules and Regulations, the Employer must provide the Regional Director and parties named in this decision a list of the full names, work locations, shifts, job classifications, and contact information (including home addresses, available personal email addresses, and available home and personal cell telephone numbers) of all eligible voters.

To be timely filed and served, the list must be *received* by the regional director and the parties by December 15, 2020. The list must be accompanied by a certificate of service showing service on all parties. **The region will no longer serve the voter list.**

Unless the Employer certifies that it does not possess the capacity to produce the list in the required form, the list must be provided in a table in a Microsoft Word file (.doc or docx) or a file that is compatible with Microsoft Word (.doc or docx). The first column of the list must begin with each employee's last name and the list must be alphabetized (overall or by department) by last name. Because the list will be used during the election, the font size of the list must be the equivalent of Times New Roman 10 or larger. That font does not need to be used but the font must be that size or larger. A sample, optional form for the list is provided on the NLRB website at www.nlr.gov/what-we-do/conduct-elections/representation-case-rules-effective-april-14-2015.

When feasible, the list shall be filed electronically with the Region and served electronically on the other parties named in this decision. The list may be electronically filed with the Region by using the E-filing system on the Agency's website at www.nlr.gov. Once the website is accessed, click on **E-File Documents**, enter the NLRB Case Number, and follow the detailed instructions.

Failure to comply with the above requirements will be grounds for setting aside the election whenever proper and timely objections are filed. However, the Employer may not object to the failure to file or serve the list within the specified time or in the proper format if it is responsible for the failure.

No party shall use the voter list for purposes other than the representation proceeding, Board proceedings arising from it, and related matters.

D. Posting of Notices of Election

Pursuant to Section 102.67(k) of the Board's Rules, the Employer must post copies of the Notice of Election accompanying this decision in conspicuous places, including all places where notices to employees in the unit found appropriate are customarily posted. The Notice must be posted so all pages of the Notice are simultaneously visible. In addition, if the Employer customarily communicates electronically with some or all of the employees in the unit found appropriate, the Employer must also distribute the Notice of Election electronically to those employees. The Employer must post copies of the Notice by 12:01 a.m. on December 18, 2020 and must remain posted until the end of the election. However, a party shall be estopped from objecting to the non-posting of notices if it is responsible for the non-posting, and likewise shall be estopped from objecting to the non-distribution of notices if it is responsible for the non-distribution. Failure to follow the posting requirements set forth above will be grounds for setting aside the election if proper and timely objections are filed.

RIGHT TO REQUEST REVIEW

Pursuant to Section 102.67 of the Board's Rules and Regulations, a request for review may be filed with the Board at any time following the issuance of this Decision until 10 business days after a final disposition of the proceeding by the Regional Director. Accordingly, a party is not precluded from filing a request for review of this decision after the election on the grounds that it did not file a request for review of this Decision prior to the election. The request for review must conform to the requirements of Section 102.67 of the Board's Rules and Regulations.

A request for review must be E-Filed through the Agency's website and may not be filed by facsimile. To E-File the request for review, go to www.nlr.gov, select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions. If not E-Filed, the request for review should be addressed to the Executive Secretary, National Labor Relations Board, 1015 Half Street SE, Washington, DC 20570-0001, and must be accompanied by a statement explaining the circumstances concerning not having access to the Agency's E-Filing system or why filing electronically would impose an undue burden. A party filing a request for review must serve a copy of the request on the other parties and file a copy with the Regional Director. A certificate of service must be filed with the Board together with the request for review.

Neither the filing of a request for review nor the Board's granting a request for review will stay the election in this matter unless specifically ordered by the Board. If a request for review of a pre-election decision and direction of election is filed within 10 business days after issuance of the decision and if the Board has not already ruled on the request and therefore the issue under review remains unresolved, all ballots will be impounded. Nonetheless, parties retain the right to file a request for review at any subsequent time until 10 business days following final disposition of the proceeding, but without automatic impoundment of ballots.

Dated: December 11, 2020

/s/PAUL J. MURPHY

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